

Honorable Mariane Spearman
Hearing Date: Tuesday, September 15, 2015
Without Oral Argument

SUPERIOR COURT OF WASHINGTON KING COUNTY

MARTIN O'DONNELL, an individual,

Plaintiff,

v.

BUNGIE, INC., a Washington corporation, and
HAROLD RYAN, an individual,

Defendants.

CASE NO. 14-2-19913-9 SEA

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION TO
CONFIRM AND ENFORCE FINAL
ARBITRATION AWARD**

1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 Plaintiff Martin O'Donnell ("O'Donnell") requested the entry of an order confirming and
3 enforcing the Revised Final Award ("Award") issued by the Hon. Sharon Armstrong (Ret.) on
4 September 3, 2015. Defendants Bungie, Inc. ("Bungie" or the "Company") and Harold Ryan
5 ("Ryan") (collectively, the "Defendants") do not oppose an order confirming and enforcing the
6 Award, and merely ask that it be confirmed and enforced as to *all* parties and in its *entirety*.

7 As discussed in greater detail below, the Award grants rights and remedies not only to
8 O'Donnell, but also, in significant part, to Bungie, and in fact the only rights and remedies that
9 are presently due and outstanding are those that O'Donnell owes to Bungie. All parties wish to
10 have the Award confirmed. In fact, counsel for Bungie and Ryan sought to submit a joint motion
11 to confirm and enforce, but that request was rebuffed by O'Donnell's counsel, who, at the last
12 minute, stated that he was not interested in pursuing a joint filing after rushing to the courthouse
13 to file the pending motion. Having received a copy of the pending motion, it appears that
14 O'Donnell refused to file jointly because he wished to frame the Award as only granting him
15 rights and remedies, framing he immediately used to wage a misleading public relations
16 campaign against Bungie and Ryan.

17 Regardless of O'Donnell's framing, the Award clearly demonstrates that Bungie and
18 Ryan successfully defended against each of O'Donnell's pled claims, absent alternative equitable
19 relief granted by the arbitrator, and further grants significant, ongoing rights and remedies to
20 Bungie. Accordingly, Bungie and Ryan respectfully request that the Award be confirmed and
21 enforced as to all parties. Moreover, Bungie and Ryan respectfully request that the order
22 confirming the Award be strictly limited to the language of the Award itself and not incorporate,
23 by reference or otherwise, the language used by any party to discuss or characterize the Award,
24 which speaks for itself.

1 **II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND**

2 **A. Factual Background**

3 The Award contains the arbitrator's findings of fact. *See* Timothy B. Fitzgerald in
4 Support of Motion to Confirm and Enforce Final Arbitration Award ("Fitzgerald Decl.") Ex. A at
5 § II. Defendants incorporate those findings of fact by reference as if fully set forth herein.

6 **B. Procedural Background**

7 On December 31, 2010, O'Donnell and Bungie entered into the Amended and Restated
8 Services Agreement (the "ASA"). Fitzgerald Decl. Ex. A § II(20). O'Donnell's employment
9 with Bungie was terminated on April 11, 2014. *Id.* § II(12).

10 O'Donnell submitted a Demand for Arbitration before JAMS dated April 28, 2014, in
11 which he asserted claims for declaratory relief, breach of contract, tortious interference, and
12 fraud. *Id.* § I. On July 16, 2014, the arbitrator entered a preliminary injunction concerning the
13 status of O'Donnell's Bungie stock, whereby Bungie placed certain disputed stock in escrow and
14 O'Donnell, in turn, placed \$5,000 in escrow, in each case pending a final award. *See id.*

15 On February 15, 2015, Bungie and Ryan filed an Amended Response and Counterclaims
16 asserting counterclaims on behalf of Bungie for breach of contract (including breach of good
17 faith and fair dealing), copyright infringement, conversion, breach of fiduciary duty and
18 declaratory relief. *Id.* On March 27, 2015, the arbitrator entered a second preliminary injunction
19 prohibiting O'Donnell's violation of Bungie's copyright interests and directing O'Donnell to
20 deliver to his counsel certain materials developed during O'Donnell's employment or otherwise
21 belonging to Bungie to be held in trust pending the resolution of the matter. *Id.*

22 The arbitration hearing was held June 8 through 12, 2015, and the arbitrator issued an
23 Interim Award on July 2, 2015, the Final Award on August 25, 2015 and the Award at issue on
24 September 3, 2015.¹ *Id.* Pursuant to the findings and holdings in the Award, O'Donnell did not

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26 ¹ The Award is dated September 3, 2015, but was not conveyed to the parties until September 4, 2015. *See*
27 Declaration of Stephanie L. Jensen ("Jensen Declaration" or "Jensen Decl.") ¶ 2.

1 prevail on any of his plead claims for declaratory relief, breach of contract, tortious interference
2 or fraud, but was awarded relief on an equitable basis under good faith and fair dealing. Bungie,
3 in turn, prevailed on its declaratory judgment, conversion, and copyright infringement claims
4 against O'Donnell. Neither party sought, nor was awarded, attorneys' fees or costs as a
5 "prevailing party" under the Award. An overview of the Award's resolution of the claims is
6 provided below, which helps clarify the need and importance of ensuring that Bungie's rights
7 under the Award are equally confirmed and enforced.

8 **1. The Award Denies O'Donnell's Breach of Contract Claims**

9 The Award rejects O'Donnell's claim that he had a right to his salary through April 21,
10 2010 or at least April 21, 2017, holding that the ASA included an unambiguous at-will
11 employment provision, and that O'Donnell's term of employment ended when he was terminated
12 on April 11, 2014. *Id.* § III(A)(i).

13 The Award rejects O'Donnell's claim that the ASA precluded Bungie from forfeiting all
14 336,375 shares of Bungie stock that O'Donnell held upon his termination, noting that
15 O'Donnell's interpretation of the ASA's forfeiture provisions was "not the more reasonable in
16 light of the available evidence" and "would require rewriting the parties' Agreement." *Id.* §
17 III(A)(ii).

18 The Award also rejects O'Donnell's claim that he was entitled to profit sharing under the
19 Profit Participation Plan as an incidence of his share ownership. *Id.* § III(A)(iii).

20 **2. The Award Denies O'Donnell's Tortious Interference Claim**

21 The Award also rejects O'Donnell's claim for tortious interference with business
22 relationship/expectancy on behalf of Ryan, holding that O'Donnell was unable to establish the
23 required element that Ryan interfered for an improper purpose or by improper means. In so
24 holding, the Award specifically notes that "[a]s Bungie's President and CEO, Ryan had
25 responsibility to oversee Bungie's business operations and had a legitimate role in
26 recommending termination of employees, a task clearly within his scope of employment." *Id.* §
27 III(C).

1 **3. The Award Denies O'Donnell's Fraud Claim**

2 Despite O'Donnell's claim of fraud, the Award also held that there was not "clear, cogent
3 and convincing evidence that O'Donnell detrimentally relied on fraudulent misrepresentations by
4 Bungie or Ryan that his shares would receive special protection from forfeiture." *Id.* § III(A)(ii).

5 **4. The Award Grants O'Donnell Limited Relief Based on Equitable Considerations**

6 The only "claim" O'Donnell received any remedy under was a claim he did not plead, but
7 received in equity. As made clear by the recitation of asserted claims in Section I of the Award,
8 O'Donnell did not assert a claim for breach of the duty of good faith and fair dealing. Rather,
9 the Award grants O'Donnell certain limited relief thereunder, in light of his prior service to
10 Bungie. Section I of the Award acknowledges that "[t]he arbitrator's determination of remedy,
11 though premised on a breach of the duty of good faith and fair dealing, necessarily relied on
12 equitable considerations." *Id.* § I. The Award also cites to Rule 24(c) of the JAMS Employment
13 Arbitration Rules and Procedures, which "authorizes the Arbitrator to grant any remedy or relief
14 that is just and equitable and within the scope of the Parties' agreement, including but not limited
15 to specific performance of a contract or any other equitable or legal remedy." *Id.* § III(B).

16 Pursuant to these "equitable considerations" and the authority granted in JAMS Rule
17 24(c), despite finding in Bungie's favor with respect to the actual language of the contract
18 provisions at issue, the Award held that the duty of good faith and fair dealing required Bungie's
19 Board to exercise its discretion by considering O'Donnell's contributions to Bungie.
20 Accordingly, the Award grants O'Donnell 192,188 shares of vested Bungie common stock—
21 representing a mere 50 percent of the total shares he held at the time of his termination, rather
22 than the 100 percent he claimed entitlement to—and a fractional share of the profit sharing
23 O'Donnell would have received for the years 2014, 2015 and 2016 had he continued to be
24 employed with Bungie during those years. *Id.*

25 Specifically, for 2014, O'Donnell is entitled to his full profit sharing for the portion of
26 2014 in which he was employed (January 1 through April 11, 2014), and then only 15 percent of
27 what he would have received in profit sharing for the remainder of the year, which came to

1 approximately \$142,500. *See id.* § III(B); *id.* Revised Final Award at B; Fitzgerald Decl. Ex. B
2 at Ex. A (Profit Participation Plan attached to ASA). For 2015, O'Donnell is entitled to only 10
3 percent of the profit sharing he would have received had he remained employed by Bungie, and
4 for 2016, he is entitled to just 5 percent of the profit sharing he would have received had he
5 remained employed by Bungie. *See id.* The Award acknowledges that the precise amounts of
6 profit sharing for 2015 and 2016 cannot be calculated until those years' profits and the amounts
7 in the profit pool are determined at the end of each year, but the significantly reduced
8 percentages in which he will participate are set by Exhibit A to the ASA. O'Donnell is entitled
9 to *no* profit sharing under the Profit Participation Plan after 2016, despite his (unsuccessful)
10 claim that profit sharing is an incidence of share ownership and, presumably, that his profit
11 sharing should continue so long as he holds any stock in Bungie.

12 **5. The Award Denies Bungie's Breach of Contract and Fiduciary Duty Claims**

13 The Award denies Bungie's claims that O'Donnell breached the non-compete and
14 confidential information provisions of the ASA. *Id.* § III(D)(i-ii). It also denies Bungie's claim
15 that O'Donnell breached his fiduciary duties to Bungie. Despite finding that O'Donnell's actions
16 surrounding his unauthorized disclosures regarding the E3 2013 trailer were motivated, at least in
17 part, by O'Donnell's desire to "protect his own brand and reputation as a composer" and that
18 such actions "created a negative online discussion . . . upset his coworkers, and resulted in threats
19 of breach from Activision," the Award finds that Bungie did not prove monetary damages from
20 O'Donnell's conduct. *Id.* § III(F).

21 **6. The Award Grants Bungie's Conversion Claim**

22 However, the Award grants Bungie's conversion claim, holding that "Bungie has
23 established that O'Donnell converted certain Bungie property[.]" *Id.* § IV(4). It finds that "after
24 O'Donnell's termination Bungie requested that he return any of its property[.]" and
25 acknowledges that the arbitrator subsequently ordered that O'Donnell deposit such property in
26 escrow with his counsel. *Id.* § III(D)(ii).

1 The Award further finds that the “*Music of the Spheres* score, digital master, CDs, and
2 related materials are work made for hire and Bungie did not gift them to O’Donnell.” *Id.* §
3 III(D)(ii). The Award orders that the “property currently held by counsel shall be returned” to
4 Bungie. *Id.* This property “includes the following related solely to *Music of the Spheres* and
5 *Destiny*: (a) audio/visual assets of any kind and in any format including but not limited to CDs,
6 CD cases, printed art, masters and stems, sub-mixes, or other tracks; (b) any b-roll or outtakes
7 related to the production/recording thereof; (c) any recording assets of any kind and in any
8 format including but not limited to masters and stems; (d) any Bungie voice-over assets of any
9 kind including but not limited to recordings, audio/visual outtakes, audio/visual b-roll and/or
10 scripts; and (e) any other Bungie audio or visual assets of any kind including, but not limited to,
11 cinematic Foley, outtakes, sound effects, or other recordings or copies thereof.” *Id.* § III(G)(3).

12 **7. The Award Grants Bungie’s Copyright Infringement Claim and Issues**
13 **Permanent Injunction Against O’Donnell**

14 Finally, the Award grants Bungie’s claim that O’Donnell infringed its copyrights to
15 *Music of the Spheres*. The Award holds that “O’Donnell composed the *Music of the Spheres*
16 music within the scope of his employment with Bungie, and thus the composition and recording
17 is a work for hire under the federal Copyright Act, 17 U.S.C. §§ 101 *et seq.*” *Id.* § III(E). It also
18 holds that O’Donnell’s conduct exceeds the publication permitted under fair use, and that he
19 infringed Bungie’s copyrights in *Music of the Spheres*. *Id.*

20 Because O’Donnell’s course of infringement began prior to registration of the copyrights,
21 Bungie did not receive statutory damages, but the Award held that Bungie is entitled to
22 injunctive relief regarding O’Donnell’s violation of Bungie’s copyrights. *Id.* Specifically, the
23 Award orders that:

24 O’Donnell is enjoined from the following conduct with respect to *Music of the*
25 *Spheres* and *Destiny*, unless O’Donnell has obtained permission from the
26 copyright owners or has obtained the music from a publicly available source,
27 provided that such source of public information was not the result of O’Donnell
breaching any contractual agreements with Bungie:

1. Uploading *Music of the Spheres* or *Destiny* or any portion thereof, to the Internet or any file-sharing service, including Dropbox.com.
2. Copying any version of *Music of the Spheres* or *Destiny*, or any portion thereof, currently within his possession, custody, or control, including print music, master copies, audio and digital files, the score, and promotional CDs.
3. Publicly performing or playing *Music of the Spheres*, [sic] or *Destiny*, other than such material that O'Donnell can demonstrate was obtained from a publicly-available source; provided that such source of public information was not the result of O'Donnell breaching any contractual agreements with Bungie.
4. Otherwise exceeding the scope of permitted fair use of *Music of the Spheres* or *Destiny*, in violation of the federal Copyright Act[.]
5. The material referenced in this Order includes, but is not limited to the following as related solely to *Music of the Spheres* and *Destiny*: (a) audio/visual assets of any kind and in any format including but not limited to CDs, CD cases, printed art, masters and stems, sub-mixes, or other tracks; (b) any b-roll or outtakes related to the production/recording thereof; (c) any recording assets of any kind and in any format including but not limited to masters and stems; (d) any Bungie voice-over assets of any kind including but not limited to recordings, audio/visual outtakes, audio/visual b-roll and/or scripts; and (e) any other Bungie audio or visual assets of any kind including, but not limited to, cinematic Foley, outtakes, sound effects, or other recordings or copies thereof.
6. This injunction is binding on Mr. O'Donnell, his agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this injunction by personal service or otherwise.

Id. Revised Final Award at C.

III. STATEMENT OF ISSUES

1. Is O'Donnell entitled to an order confirming the Award against Defendants pursuant to RCW 7.04A.220?
2. Is Bungie entitled to an order confirming the Award against O'Donnell pursuant to RCW 7.04A.220?

1 **IV. EVIDENCE RELIED UPON**

2 Bungie and Ryan rely upon the Declaration of Stephanie L. Jensen and the exhibit
3 attached thereto, the authority cited in this brief, and the records and files herein.

4 **V. AUTHORITY**

5 **A. Entry of an Order Confirming and Enforcing the Award is Appropriate**

6 Bungie and Ryan agree with O'Donnell that this Court has jurisdiction to confirm and
7 enforce the Award, and that it is the proper venue for such motion. *See* Fitzgerald Decl. Ex. B §
8 16(a); RCW 7.04A.260(2); RCW 7.04A.270; and RCW 7.04A.220.

9 The ASA provides that the arbitration between the parties shall be administered by JAMS
10 pursuant to its Employment Arbitration Rules and Procedures ("Arbitration Rules"²). Fitzgerald
11 Decl. Ex. B § 16(a). It also provides that judgment on the Award may be entered in any court
12 having jurisdiction. *Id.* "Proceedings to enforce, confirm, modify or vacate an Award will be
13 controlled by and conducted in conformity with the Federal Arbitration Act, 9. U.S.C. Sec 1, *et*
14 *seq.*, or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to
15 have consented that judgment upon the Award may be entered in any court having jurisdiction
16 thereof." Arbitration Rule 25.

17 Washington's Uniform Arbitration Act provides that "[a]n agreement to arbitrate
18 providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment
19 on an award." RCW 7.04A.260(2). A motion for judicial relief under Washington's Uniform
20 Arbitration Act, such as the pending motion to confirm the Award, "must be filed in the court of
21 the county in which the agreement to arbitrate specifies the arbitration hearing is to be held, or if
22 the hearing has been held, in the court of the county in which it was held." RCW 7.04A.270.
23 The ASA required that the arbitration be conducted within 100 miles of Bellevue, Washington,

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25
26 ² A full copy of the JAMS Employment Arbitration Rules and Procedures is attached as Exhibit 1 to the Jensen
27 Declaration.

1 see Fitzgerald Decl., Ex. B § 16(a), and the hearing was in fact held in King County,
2 Washington.

3 Bungie and Ryan also agree that O'Donnell's motion is timely. Under the Arbitration
4 Rules, an "Award is considered final, for purposes of . . . a judicial proceeding to enforce,
5 modify or vacate the Award pursuant to Rule 25, . . . as of the effective date of service of a
6 corrected Award." Arbitration Rule 24(k). The Award was served on the parties on September
7 4, 2015, and was considered final as of that date. Jensen Decl. ¶ 2. "After a party to the
8 arbitration proceeding receives notice of an award, the party may file a motion with the court for
9 an order confirming the award, at which time the court shall issue such an order unless the award
10 is modified or corrected under RCW 7.04A.200 or 7.04A.240 or is vacated under RCW
11 7.04A.230." RCW 7.04A.220.

12 **B. The Award Should be Confirmed and Enforced in its Entirety as to All Parties**

13 While Bungie and Ryan agree that the Court *can and should* enter an order confirming
14 and enforcing the Award, they merely ask that the Award be confirmed and enforced in its
15 entirety as to *all* parties. As detailed above, both parties were awarded relief under the Award.
16 In fact, Bungie has already paid to O'Donnell the amount owed under the 2014 Profit
17 Participation Plan distribution and transferred to him the portion of the shares he was awarded
18 pursuant to the Award.³ Conversely, the Award imposes on O'Donnell a continuous, on-going
19 duty to respect Bungie's intellectual property rights on a going-forward basis in accordance with
20 the ordered injunction, and Bungie fully intends to monitor O'Donnell's compliance therewith.
21 In the event O'Donnell violates the injunction in the future, Bungie will need to return to this
22 Court for enforcement proceedings, as appropriate. Indeed, of the parties, Defendants actually
23 have a greater interest in confirming the Award, especially in light of the permanent injunction
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25
26 ³ As the 2015 and 2016 Profit Participation Plan distributions, if any, are not yet payable, Bungie has already
27 fully performed all that is presently required of it under the Award.

1 issued against O'Donnell. Accordingly, Bungie and Ryan respectfully request that the Award be
2 confirmed in its entirety as to all parties.

3 Finally, while both sides have highlighted certain portions of the Award in their briefing,
4 Bungie and Ryan respectfully request that the Award be confirmed as written and that all
5 language therein be allowed to speak for itself.

6 VI. CONCLUSION

7 For the reasons set forth above, Bungie and Ryan respectfully request that O'Donnell's
8 motion to confirm and enforce the Revised Final Award be granted, but with respect to all
9 parties, not just O'Donnell, and that the Award be confirmed in its entirety.

10 Dated: September 11, 2015

11 s/ Stephanie L. Jensen

12 Stephanie L. Jensen, WSBA #42042
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Attorneys for Bungie, Inc. and Harold Ryan

1 **CERTIFICATE OF SERVICE**

2 I, Stephanie L. Jensen, certify that I caused to be filed Defendants' Response to
3 Plaintiff's Motion to Confirm and Enforce Final Arbitration Award on the date below, and
4 served a copy of the same by email, pursuant to an agreement for service by email, to the party
5 listed below:

6 Robert M. Sulkin
7 Timothy B. Fitzgerald
8 Jehiel I. Baer
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17 *Attorneys for Plaintiff*

18 I am readily familiar with Wilson Sonsini Goodrich & Rosati's practice for the collection
19 and processing of documents for delivery according to the instructions indicated above. In the
20 ordinary course of business, documents would be handled accordingly.

21 I declare under penalty of perjury under the laws of the State of Washington that the
22 foregoing is true and correct.

23 Executed on September 11, 2015 at Seattle, Washington.

24 s/ Stephanie L. Jensen
25 Stephanie L. Jensen, WSBA #42042